86-6780

No. 86-

In The

Supreme Court of the United States

October Term, 1986

Frederick R. Silvestri, Sr.,

Petitioner,

-v-

United States of America,

Respondent.

Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The First Circuit

Frederick R. Silvestri, Sr
Petitioner Pro Se
David Cross Road
Durham, NH 03855

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QUESTION PRESENTED

Whether the inevitable discovery standard applied by the Court of Appeals for the First Circuit in affirming the admission into evidence at trial, marijuana seized during a warrantless entry was permissible considering the fact that the trial court had ruled that the warrantless entry was

illegal and inexcusable and not justified by exigent circumstances?

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REASON FOR GRANTING THE WRIT

It is respectfully submitted that the Writ of Certiorari sought by Petitioner should be granted for the reason that the United States Court of Appeals for the First Circuit in affirming Petitioner's conviction ignores existing case law, thereby placing itself in

conflict with seven (7) other Circuit Courts of Appeals. * * *

To The Honorable, The Chief Justice of the United States and, The Associate Justices of the United States Supreme Court.

Petitioner, Frederick R. Silvestri, Sr., PRAYS that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit that affirmed a judgment of the United States District Court for the District of Massachusetts holding inter alia, that while securing officers conducted an unlawful search prior to the arrival of a search warrant and discovered bales of marijuana and hashish in a garage located on the premises the seizure was nonetheless permissible based upon the "inevitable discovery" exception enunciated in Nix v. Williams, 467 U.S. 431 (1984).

The ORDER of the Court of Appeals affirming the judgment of the District Court was rendered on April 1, 1986. A copy of

the ORDER is annexed hereto as Appendix "A".

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 United States Code, Section 1254(1).

No application has been filed for an extension of time within which to file this petition.

STATEMENT OF THE CASE

On December 12, 1982, the Petitioner and five other persons were indicted for violations of the federal narcotic laws including conspiracy to possess with intent to distribute and possession with intent to distribute more than 1,000 pounds of marijuana in violation of Title 21, United States Code, Sections 846, 841(a)(1) and 841(b)(6).

On May 20, 1983, after a hearing, the Honorable Walter J. Skinner, United States

District Judge, denied Petitioner's motion to suppress evidence discovered at Petitioner's residential compound located in New Durham, New Hampshire.

The district court held that the affidavit, on its face, provided probable cause to search the property. The affidavit was alleged to be misleading, however, because of its failure to distinguish between Petitioner and Petitioner's son Frederick Silvestri. On this issue, the district court found the conflation to be misleading and confusing but not necessary to the finding of probable cause. For that reason, the district court did not find it necessary to hold an evidentiary hearing of the type required by this Court's holdings in Franks v. Delaware, 438 U.S. 54 (1978).

On July 23, 1983, the case was tried on stipulated facts before the Honorable W. Arthur Garrity, United States District Judge.

The Petitioner was convicted. On August 26, 1983, the Peitioner was committed to the custody of the Attorney General of the United States for a period of one (1) year and one (1) day.

On appeal Petitioner challenged the denial of his motion to suppress evidence. See, United States v. Curry, 751 F.2d 442, 447 (1st Cir., 1984). The Court below affirmed the denial of the suppression motion, but remanded the case for the following purposes:

> 1. For the district court to determine whether any items in plain view of the officers who illegally entered to secure the premises pending arrival of the search warrant were introduced into evidence and to specify those items; and
>
> 2. For the district court to hold a hearing regarding the conflation of the petitioner and his son in the search warrant affidavit. (Id at 449-50).

Following the remand, Judge Skinner held a Franks v. Delaware, supra, hearing. On June 11, 1985, the district court, in a memorandum opinion, found that there were "no

plain view items" discovered during the securing of Petitioner's premises. The Court concluded, however, that the securing officers conducted an unlawful search prior to the arrival of the warrant and discovered bales of marijuana in a garage located on the premises. The District Court refused to suppress the marijuana, however, on the grounds that the marijuana would have inevitably been discovered by lawful means then in the process, relying on Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984).

Petitioner appealed these findings to the Circuit Court of Appeals for the First Circuit. On April 1, 1986, the First Circuit affirmed the findings had in the District Court, concluding that the instant case was controlled by the case of Segura v. United States, _____ U.S. _____, 104 S.Ct. 3380 (1984).

DISCUSSION

Petitioner submits that the Court of Appeals erred in holding that the marijuana bales and hashish discovered during the warrantless entry into the garage could be admitted at trial because they would inevitably have been discovered during the course of the subsequent warrant search. See, Nix v. Williams, 467 U.S. 431 (1984). Moreoever, petitioner submits that since the marijuana bales and hashish were first discovered during the warrantless entry they are a "fruit of the poisonous tree doctrine". Nardone v. United States, 338, 341 (1939).

Central to petitioner's claims is the fact that the warrantless entry was unlawful because it was not justified by exigent circumstances. See, United States v. Curry, 751 F.2d 442, 447 (1st

Cir., 1984); and United States v. Silvestri, No. 85-1534 (decided April 1, 1986) (1st Cir.).

In the United States v. Silvestri, supra the court stated:

> "In the original opinion the district court held that the warrantless entry upon the property in New Durham was illegal and inexcusable and could not be justified by exigent circumstances". (Slip opinion at p. 3) (Emphasis supplied).

ARGUMENT

It has been long established that the exclusionary rule prohibits the government from using evidence that has

been obtained in violation of a defendant's fourth amendment rights. See, Weeks v. United States, 232 U.S. 383, 398 (1914); and Mapp v. Ohio, 367 U.S.643, 655 (1961). Moreover, evidence obtained as a direct result of unconstitutional conduct (as in the case at bar) is subject to exclusion, in addition, the rule reaches evidence later discussed and found to be derived from illegal conduct, or a "fruit of the poisonous tree". See, Nix v. Williams, supra., (exclusionary rule applies not only to illegally obtained evidence, but also to other incriminating evidence derived from primary evidence); Wong Sun v. United States, 371 U.S. 471, 484-87 (1963); and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) Cf. United States v. Schaefer, 691 F.2d 639, 641-44 (3rd Cir., 1982).

This Court in carving out exceptions to the exclusionary rule under the "fruit of the poisonous tree" doctrine has established that a court may admit evidence that is the fruit of illegal police conduct if:

1. The evidence would inevitably have been discovered in the course of the investigation;

2. The connection between the challenged evidence and the illegal conduct is so attenuated that it dissipates the taint of the illegal action; or

3. The evidence was obtained from a source independent of the constitutional violation.

This Court in Nix explained, the inevitable discovery doctrine is akin to the harmless error rule, in that it ensures that evidence will not be suppressed because of police misconduct if the evidence would have been obtained even absent that misconduct.

Therefore, this Court held that if the prosecution can establish by a preponderence of the evidence "that the information ultimately or inevitably would have been discovered by lawful * * * means then the deterrence rationale has so little basis that the evidence should be received" (Nix, Slip op. p. 11). To suppress evidence in that setting, the Court stated, "would place courts in the position of withholding from juries relevant and undoubted trust that would have been available to police absent any unlawful activity". (id at p. 12).

Petitioner submits that the bales of marijuana and hashish were "primary evidence" that was tainted by the illegal warrantless entry. Thus, the decision in the court below is inconsistent with Segura v. United States, ___ U.S. ___, 104 S.Ct. 3380 (1984) because as the Court there noted that "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject

to exclusion" (Slip op. p.8). Therefore, their admission into evidence was inadmissable.

In the case of United States v. Segura, 663 F.2d 411 the Second Circuit held, in a part of its opinion not affected by this Court's review, that evidence seen during an illegal prewarrant entry should be suppressed despite the later acquisition and suppression was necessary, the court reasoned, because it provided the only effective disincentive to illegal prewarrant entries and searches and, without this disincentive, police officers would find it easy to bypass "the constitutional requirement that probable cause should be generally assessed by a neutral and detached magistrate before the citizen's privacy is invaded." Supra, 663 F.2d at 417 (quoting United States v. Roselli, 506 F.2d 627, 630 (7th Cir., 1974)).

Additionally, the Second Circuit in the case of United States v. Alverez, 643 F.2d

54, 64, (2nd Cir.), cert. denied, 454 U.S. 839 (1981) stated:

> "we will not risk the whittling down of the warrant requirement...by justifying the admission of evidence under a broad inevitable-discovery exception".

The decision of the First Circuit in the case is in conflict with the decisions of the Second, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits. Moreover, the decision of the First Circuit is also in conflict with decisions of more than ten (10) states. Clearly then, petitioner's case presents a true conflict of law among the circuits. The fact that some of the cases relied upon by petitioner were decided prior to Nix is of no consequence to this Court's deliberations, as Nix did not change the law in federal courts. It merely reaffirmed it. Prior to Nix, "[e]very Federal Court of Appeals having jurisdiction over criminal matters...endorsed the inevitable discovery doctrine". Nix v. Williams, 467 U.S. at 440n.2.

The courts of appeals that have decided cases in conflict with the court below thus did so despite their recognition of an inevitable discovery rule. The Eleventh Circuit, in a case decided after Nix, specifically refused to adopt the position espoused by the court below. The Fifth Circuit has now done the same in United States v. Cherry, 759 F. 2d 1196, 1205 (5th Cir., 1985), which relied upon United States v. Satterfield, 743 F.2d 827 (11th Cir., 1984) and the leading case of the United States v. Griffin, 502 F.2d 959, 961 (6th Cir.) cert. denied, 419 U.S. 1050 (1974), to hold that a result such as that reached by the court below "would cause the inevitable discovery exception to swallow the [warrant requirement] by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means."

The Tenth Circuit, in a post-Nix decision, also has now joined the six other circuits which are in conflict with the court below. In United States v. Owens, 782 F.2d 146, 152-53 (10th Cir., 1986), the Tenth Circuit, like the Eleventh Circuit in Satterfield, held that when an illegal search occurs, the process of procuring the evidence legally must already by underway or the inevitable discovery rule will not apply. See also, United States v. Romero, 692, F.2d 699, 704 (10th Cir., 1982.).

The Court below can take no comfort upon basing its decision on United States v. Segura, 104 S.Ct. 3380 (1984), as Nix was decided before Segura. For, if the court below is correct that Nix applies in the Fourth Amendment context, Segura would easily have been decided on inevitable discovery grounds. It was not. Indeed, the Chief Justice in his majority opinion in Segura neither discussed nor cited his opinion for the Court in Nix.

Instead, his Segura opinion reaffirmed that the direct products of illegal entries will continue to be suppressed and added, in a statement joined by Justice O'Conner, that "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case". 104 S.Ct. at 3390.

Recognizing that said decision places itself in conflict with other Courts of Appeals, the Silvestri Court specifically discussed at length and rejected not only the Second Circuit's holdings in Satterfield, the Fifth Circuit's ruling in Cherry and the Tenth Circuit's decision in Owens, all of which were decided after Nix. Silvestri, at pp. 14-24.

This conflict between the federal Courts of Appeals on this recurring and important issue cannot be denied. Therefore,

this case clearly warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
Frederick R. Silvestri, Sr.
Petitioner, Pro Se

September 30, 1986

Frederick R. Silvestri Sr.
Frederick R. Silvestri, Sr.
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari has been mailed, postage prepaid, to the following on this 30th day of September, 1986.

Charles Fried, Solicitor General
U.S. Department of Justice
Washington, DC 20530

William Weld, U.S. Attorney
1107 John W. McCormack POCH
Boston, MA 02109

Frederick R. Silvestri Sr.
Frederick R. Silvestri, Sr.
Petitioner, Pro Se

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1534

UNITED STATES,
Appellee,

v.

FREDERICK SILVESTRI, ELDER
Defendant, Appellant.

JUDGMENT

Entered: April 1, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

cc: Messrs. McManus & Dembin

Francis P. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1534

UNITED STATES OF AMERICA,
Appellee,

v.

FREDERICK SILVESTRI, ELDER,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, U.S. District Judge]

Before

Bownes, Aldrich and Breyer,

Circuit Judges.

Anthony A. McManus for appellant.
Mitchell D. Dembin, Assistant United States Attorney, with whom William F. Weld, United States Attorney, was on brief for appellee.

April 1, 1986

BOWNES, Circuit Judge. This is the second time this search and seizure case has been considered by us. Our first opinion, United States v. Curry, 751 F.2d 442 (1st Cir. 1984) remanded three matters to the district court for further proceedings, two of which are relevant to this case. We asked the district court to determine whether there were any items introduced into evidence which were in plain view prior to the arrival of the search and, if so, to specify them. Because of a conflation in the search warrant affidavit of the activities of Frederick Silvestri, Sr., and his son, Frederick Silvestri, Jr., we also directed the district court to hold a hearing pursuant to Franks v. Delaware, 38 U.S. 154 (1978).

The district court found that there were no plain-view items introduced in evidence. It also found that, under the inevitable discovery exception to the

exclusionary rule, evidence not in plain view but seen prior to the arrival of the search warrant was admissible.

After holding a Franks v. Delaware hearing, the district court ruled that the search warrant was valid.

Both rulings have been appealed.

PREWARRANT EVIDENCE

Sometime between 3:00 and 3:30 a.m. on April 30, 1982, New Hampshire State Police Officers entered and secured property owned by defendant-appellant Frederick Silvestri, Sr., in New Durham, New Hampshire, pending the arrival of a search warrant. The officers had been told by other police officers that there was a reason to believe that large quantities of marijuana were present on the property and that they should secure the premises. There were two buildings on the property: a single family dwelling occupied by defendant and an apartment over a garage occupied by his son's

estranged wife. All occupants of the residences were awakened and the police fanned out through the dwellings to ensure that no other persons were inside. Sometime prior to the arrival of the search warrant, Sergeant DuBois asked defendant, who was being detained, if the garage was open. Upon learning that the garage was locked, DuBois asked for the key and defendant provided it. Sergeant DuBois unlocked the garage and looked inside; he saw many bales of marijuana and blocks of hashish. Sergeant DuBois then called the state police barracks in Epping, New Hampshire, and reported that he had found the garage full of marijuana. A search warrant was ultimately obtained and arrived in New Durham at 11:30 that morning.[1] At that time, the police seized 99 bales of marijuana from the garage, a truck

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1. In our previous review, we held that probable cause to search existed prior to the initial entry and that the later-acquired warrant was validly based upon this probable cause. United States v. Curry, 751 F.2d at 448.

registered to defendant containing 1489 pounds of hashish, a block of hashish in his house, and various documents.

In its original opinion, the district court held that the warrantless entry upon the property in New Durham was "illegal and inexcusable" and could not be justified by exigent circumstances. Curry, 751 F.2d 447. This holding was not disturbed by our remand opinion. What is at issue now is the admissibility of the hashish and marijuana found in the garage. Defendant claims that since this evidence was seen by Sergeant DuBois prior to the issuance and arrival of the search warrant, it was illegally seized and must be suppressed. In our remand opinion, we noted that while the Supreme Court had recently held that evidence first observed under a valid search warrant was not tainted by a prior illegal entry, it had left open the question of whether evidence observed during the illegal entry was required to be suppressed. United States v. Segura,

__ U.S. __, 104 S. Ct. 3380, 52 U.S.L.W. 5128 (U.S. June 26, 1984). The Second Circuit, in a holding not appealed to the Supreme Court, had held in Segura that evidence discovered in plain view during the initial illegal entry must be suppressed. United States v. Segura, 663 F.2d 411, 417 (2d Cir. 1981). The district court had not distinguished between evidence observed prior to the warrant and evidence first observed after the arrival of the warrant in denying defendant's suppression motion and we, therefore, remanded the case back to the district court for a determination as to what, if any, of the evidence introduced against defendant was "in plain view" during the initial illegal entry.

Upon remand, the district court found that the only evidence not found pursuant to the warranted search was the marijuana and hashish found in the garage, and that this evidence was not in plain view. The district court went on to hold that under the inevitable discovery

exception to the exclusionary rule endorsed by the Supreme Court in Nix v. Williams, 52 U.S.L.W. 4732 (U.S. June 11, 1984), this evidence should not be suppressed. It found that the two preconditions to the application of the inevitable discovery exception were present: the evidence would inevitably have been discovered by a lawful means, viz, the warrant, and the lawful means were in progress at the time the evidence was found, viz, the preparation of a warrant application.

Defendant argues against the district court's application of the inevitable discovery rule. He first contends that the inevitable discovery rule should not be applied here at all. In the alternative, he contends that if Nix does apply, it requires that the legal means for finding the illegally discovered evidence be in process at the time of the discovery. He argues that this requirement was not met here because, contrary to the district court's finding, the warrant application process had not in fact

been initiated at the time of the illegal discovery.

Whether or not the district court properly applied the inevitable discovery rule requires first an examination of this circuit's recent opinion in United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985). In that case, we applied the independent source exception to the exclusionary rule to permit the admission of evidence found in substantially similar circumstances to those here. In Moscatiello, we assumed for the purposes of the opinion that a warrantless entry into a warehouse by police officers which resulted in the observation of numerous bales of marijuana was not justified by exigent circumstances. Subsequent to this entry, a warrant was sought and executed. Focusing upon the reasoning in the Supreme Court's opinion in Segura which found that a search warrant issued subsequent to an illegal entry served as an "independent" and untainted source for the evidence first ob-

served during the warranted search, we reasoned that the subsequently obtained warrant could also serve as an "independent justification" for the evidence first observed during the illegal search. Moscatiello, 771 F.2d at 603. We held that the initial discovery of the evidence in no way tainted the issuance of the warrant or rediscovery of the evidence pursuant to the warrant. Id. We noted that while the majority opinion in Segura suggested that suppression of evidence first obtained during an illegal prewarrant entry was a possible consequence of such entry, the dissenters pointed out that if the warrant is an independent source for evidence seen subsequent to an illegal entry, then logically it would also be an independent source for evidence seen during the illegal entry. Id. We concluded that because the warrant was clearly independent of the legal entry, it could serve as an independent source for the evidence first discovered during the illegal entry. Id.

In light of the analysis in Moscatiello, we think it necessary to distinguish those situations in which application of the "independent source" exception to the exclusionary rule, as opposed to the "inevitable discovery" exception, is appropriate. As the Supreme Court pointed out in Nix, the "independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix, 52 U.S.L.W. at 4375 (emphasis added). The independent source doctrine did not apply in Nix, however, because the evidence was in fact discovered by illegal means. Id. Now, we must ask which is the proper analysis to apply when evidence is discovered as the result of either an illegal entry or search of premises for which a legal search warrant eventually issues? This will depend upon whether the evidence first observed illegally can be considered to be cleanly "rediscovered" when the warrant is executed. In the classic independent source situation, in-

formation which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source. Although it is tempting to say that the same thing occurs when the warrant is executed, there is an important difference between the classic independent source situation and the warrant situation. The difference is that in the classic situation the tainted evidence is information, which is intangible. In the warrant situation, the tainted evidence will be tangible objects observed during either an illegal security sweep or search. Due to the intangible nature of information, it cannot be seized. Tangible objects, on the other hand, are susceptible to seizure and once seized cannot be cleanly reseized without returning the objects to private control. The question, then, is whether objects seen as the result of either an illegal security sweep or search should be considered illegally seized before the warrant is executed.

In Segura, the Supreme Court held that objects first seen during a warranted search, but found on premises which had been secured by the police prior to the issuance of the warrant, were legally seized by the warrant and admissible as evidence. The court based this holding on a determination that a general seizure of premises, such as that effectuated by an exterior securing did not constitute seizure of the unobserved objects contained within the premises. 52 U.S.L.W. at 5132. However, the Court did go on to point out that an illegal entry into private premises can constitute a search, whether it is limited to a security sweep or a more intrusive invasion, and suggested that such a search may require suppression of all evidence observed during the entry. Id.

Although the Court did not explain why such evidence might be suppressed, it must be because once evidence is observed and the premises continue to remain under the control of

the police, the items observed are considered to have been seized by the illegal search. The conjunction of observation of specific objects and the assertion of control over those objects via the "securing" of the property sufficiently affects possessory interests in those particular objects to amount to a seizure. Because the police at no point relinquish control over the premises and the observed objects, there is no interruption of the illegal seizure. As a result, when the warrant arrives, it does not effect a legal seizure of those previously observed as illegally seized items because they cannot be legally seized unless the police relinquish control of them. In McGarry's Inc. v. Rose, 344 F.2d 416 (1st Cir. 1965), we found that documents previously illegally seized by the IRS could be legally seized a second time because the documents had been returned to the owner in the interim and an independent basis for the seizure had been established. When,

however, the items in question are not returned to the control of the owner, they are not in a position to be legally seized. Thus, the independent source exception cannot be applied because the independent source does not result in a legal seizure.

A recognition that items observed during the securing of a premises are illegally seized avoids the concern of the dissent in Segura that a later-acquired warrant vel non could serve as an independent source for objects initially observed under the illegal seizure as well as objects first observed under the warranted search. Segura, 52 U.S.L.W. at 5137 (Stevens, J., Brennan, J., Marshall, J., and Blackmun, J., dissenting). The question in this kind of situation must be, as it was in Nix, whether the evidence inevitably would have been seized by an independent legal means. The warrant must not only be independent, it must be inevitable as well.

In Nix v. Williams, 52 U.S.L.W. 4732, the Supreme Court endorsed an additional exception to the basic rule that evidence which has been illegally obtained or derived from illegally obtained evidence must be suppressed. Since suppression of evidence will often have the effect of allowing criminals to go unpunished, it is justified only as a means of deterring the police from violating constitutional and statutory rights. 52 U.S.L.W. at 4735. Thus, when the police are placed in a better position because of their misconduct, the deterrence rationale requires that the advantage be wiped out through suppression. However, the deterrence rationale does not justify putting the police in a worse position than they would have been had no misconduct occurred. Id. The Court has found that the "public interest in having juries receive all probative evidence of a crime" outweighs the need to discourage police misconduct. Id. Thus, the independent source exception allows the admission of

evidence which was gained through an independent source as well as the tainted source. In Nix, the Supreme Court extended this reasoning to situations in which the evidence discovered through the misconduct was not actually discovered through an independent source, but inevitably would have been legally discovered had the misconduct not occurred. In these situations, the Court stated there would actually be no additional deterrence value in suppressing the evidence. Id. Specifically, the Court reasoned that if, at the time of the misconduct, the police have not reason to believe the discovery of the evidence is inevitable, the existence of an inevitable discovery exception to the exclusionary rule will not provide any incentive to violate the Constitution. In such a situation, the deterrence provided by the basic exclusionary rule should be sufficient to prevent the misconduct. If, on the other hand, the police are aware

that discovery is inevitable through lawful means, they have no real need to accelerate discovery through illegal means. Id. Furthermore, the possibility of civil liability or administrative punishment should provide disincentives to such "shortcuts." The Court held, therefore, that as long as it can be shown by reference to "demonstrated historical facts," id. at 4375 n.5, that an independent and untainted discovery would inevitably have occurred, the evidence will be admissible.

The district court found that the marijuana and the hashish were discovered in the garage during the illegal entry. Since the police maintained control over the marijuana and hashish until the execution of the search warrant, we find that they were illegally seized and the warrant did not effectuate a legal seizure. The obtaining of the warrant may, however, provide the basis for admitting the materials under the inevitable discovery exception to the exclusionary rule.

We turn first to defendant's contention that the district court erred in finding "that the lawful process of preparing an application for a warrant was going forward at the time of the discovery of the evidence." We find no support for this conclusion in the record.

We begin with an undisputed fact: the initial illegal entry took place between 3:00 and 3:30 a.m. The next significant event was the discovery by Sergeant DuBois of the marijuana and hashish in the garage after obtaining the key from defendant. The district court made no finding of the time this occurred, saying only that DuBois obtained the key "[w]hile the property was being secured, but before the warrant arrived." At the evidentiary hearing held on remand, Sergeant DuBois was not available to testify due to a severe back problem. The government did agree to a stipulation offered by defense counsel as to what Sergeant DuBois would have testified had

he been available. The stipulation indicates that Sergeant DuBois looked in the garage "[a]fter they had been there for almost an hour." This would put the discovery of the marijuana and hashish at 4:00 or 4:30 a.m. The next significant event would be the commencement of the process of obtaining the search warrant. The testimony at the evidentiary hearing shows that two officers were involved in the process. Sergeant Carpenito prepared the affidavit and Lieutenant Brown prepared the warrant application and warrant at the police barracks in Epping, New Hampshire. The district court found that immediately after Sergeant DuBois' discovery of the drugs in the garage, he relayed his discovery by telephone to "Trooper Brown, who was engaged in seeking a warrant." This would mean that by 4:30 a.m. Lieutenant Brown was at the Epping barracks and preparing the warrant application. The difficulty with this finding is that it lacks support in the record.

The record shows that Lieutenant Brown and Sergeant Carpenito were engaged in surveillance of defendant's property in New Durham when they began following, in separate cars, a Jartran Truck which left the property. Both Carpenito and Brown followed the truck to Leominster, Massachusetts, and participated in an arrest there a little after 1:00 a.m. According to the testimony of Carpenito, he and Brown then went to the Massachusetts State Police barracks in Leominster, arriving around 1:30 a.m., to be interviewed by district attorneys there for search warrants to be executed in Massachusetts. Carpenito testified that he was at the barracks in Massachusetts until 4:00 a.m. and that Brown was with him during this period. Carpenito then left for Epping, New Hampshire. He testified that it took about an hour and a half to get from Leominster to Epping and that he arrived at 6:00 a.m., at which time he began preparing the affidavit. Carpenito tes-

tified further that he did not believe that anyone could have started writing the search warrant affidavit earlier than 6:00 a.m. because there was no one in New Hampshire who had been in Massachusetts and had the necessary facts until he arrived at 6:00 a.m. Carpenito also testified that he himself did not receive the phone call from Sergeant DuBois reporting the drugs in the garage and that he did not know who had talked to DuBois personally. Nor does DuBois' stipulated testimony indicate who DuBois spoke to when he called the barracks in Epping. Finally, Lieutenant Brown's own testimony at the hearing says nothing about when he began writing the warrant application or whether he personally spoke to DuBois about the discovery of the drugs in the garage. He testified only that he was with Sergeant Carpenito while the affidavit was being prepared, that he finished the warrant application a little sooner than Carpenito finished the affidavit and that he left early.

We find no evidence in the record for the district court's finding that Sergeant DuBois spoke to Lieutenant Brown when he called Epping to report his discovery. Furthermore, while the record does not conclusively rule out the possibility that Lieutenant Brown was in Epping at around 4:30 or 5:00 that morning, what evidence there is speaks against it. Carpenito stated that Brown was with him at the Leominster barracks and that it was Brown who was being interviewed by the district attorneys for the Massachusetts affidavits. Carpenito was making telephone calls during his period and waiting to see if they needed to interview him. In order to be in Epping by 4:30 a.m., Brown would have had to leave Leominster at 3:00 a.m. Yet Carpenito, who seems to have been less important than Brown for the Massachusetts affidavits, did not leave Leominster until 4:00 a.m. and testified that he did not believe anyone who had been in Massachusetts was available in New Hampshire any earlier to

start the warrant process. We agree with defendant that the warrant process had not been initiated at the time of the discovery of the evidence.

We now consider defendant's claim that Nix holds that the inevitable discovery exception applies only where the legal process for discovering the evidence has already been set in motion at the time of the illegal discovery. We have looked closely at the Court's opinion in Nix to see if such a holding may be found there and, in our view, Nix does not provide a conclusive answer on this issue. To the extent that the Court's holding may be limited by the facts of the case before it, it is possible to narrow the holding of the case, as was done by the dissent, so as to limit the admission of evidence under this exception to evidence that "inevitably would have been discovered in the same condition by an independent line of investigation that was

already being pursued when the constitutional violation occurred." Id. at 4739 (Brennan, J. and Marshall, J., dissenting). The independent search which the court concluded would have inevitably turned up the murder victim's body was actually in progress and approaching the location of the body when that location was discovered by means of an illegally obtained confession. Nonetheless, the majority did not say that discovery could only be found inevitable if the legal means of obtaining the evidence were in progress at the time the evidence was illegally discovered. It concluded only that the inevitability of the discovery was demonstrated by the ongoing nature of the search and the progress it had already made.

The Fifth Circuit has addressed this issue and has concluded that the legal process of discovery must be ongoing at the time of the illegal discovery in order for the inevitable

discovery exception to be applicable. In particular, the prosecution must demonstrate:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternate line of investigation.

United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985). The Fifth Circuit determined in Cherry that this test was consistent with the Supreme Court's reasoning in Nix despite the fact that in some cases the application of this rule may put the police in a worse position than they would have been had they pursued available legal means. The court reasoned that application of the inevitable discovery exception in situations in which the police have not been in "active pursuit of an alternate line of investigation that is at minimum supportable by leads" would

promote police misconduct because the police in such a situation would be more likely to believe that the evidence would be undiscoverable unless they engaged in illegal conduct and they would also know that there was a chance that the evidence might not be suppressed if hindsight revealed an alternate legal means to discover it. In such a situation, the police might well reason that they have nothing to lose by engaging in misconduct. The court also pointed out that without the requirement of active pursuit of the alternative legal means, the inevitable discovery exception could come to "swallow the rule by allowing evidence otherwise tainted merely because the police could have chosen to act differently and obtain the evidence by legal means. When the police forego legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the

exclusionary rule." Id. In addition to these deterrence concerns, the court also pointed out that where there is nothing more than a "mere intention to use legal means subsequently" on the part of the officer, there are no historical facts upon which to base a finding of inevitability and it is pure speculation. Id. at 1205 n.10. Thus, in Cherry, the court refused to admit evidence found during a search made pursuant to illegally obtained consent even though the government plausibly argued that at the time of the search the government had more than enough probable cause to obtain a search warrant. At the time of the illegal search, "the agents had not even begun taking notes for the purpose of drafting an affidavit, a necessary prerequisite to the procurement of a warrant," id. at 1206, and, in fact, no attempt to get a warrant was ever made.

Virtually the same rule has been adopted by the Eleventh Circuit. In United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984),

cert. denied, 105 S. Ct. 2362 (1985), the court found that evidence discovered during the illegal warrantless search which was later followed by a search under a legal warrant was not admissible because at the time of the illegal search the government did not possess a legal means of discovering the evidence, i.e., a warrant, nor were they actively pursuing such means, i.e., they had not initiated the warrant process. The court reasoned that allowing the police to search first and seek a warrant later would vitiate the requirement of the fourth amendment that a warrant be obtained prior to a search. Implicit in the court's analysis also appears to be a concern that the independence of a postsearch warrant will be compromised; "a valid search warrant nearly always can be obtained after the search has occurred." Id. at 846. Reading the opinion in Nix narrowly, the court concluded that this analysis was consistent with Nix.

The Tenth Circuit has also required that there be an ongoing legal investigation at the time the evidence is illegally discovered. United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982). In a post-Nix case involving an illegal warrantless search where no warrant was ever sought, the court refused to apply the inevitable discovery exception because no independent investigation was ongoing. United States v. Owens, slip op. (10th Cir. Jan. 22, 1986). The court also quoted the narrow language of the Nix dissent, limiting the inevitable discovery exception to situations in which an independent line of investigation was already being pursued at the time of the constitutional violation.

In at least one case, this circuit has also adopted a similar rule. In United States v. Finucan, 708 F.2d 838 (1st Cir. 1983), we held that the mere fact that illegally obtained documents could have been lawfully subpoened by the grand jury was not sufficient

to allow application of the inevitable discovery exception. Unlike McGarry's Inc. v. Rose, 344 F.2d 419, in which a legal summons was already drafted at the time of the illegal seizure, in Finucan there were no legal efforts to obtain the documents prior to the illegal seizure nor sufficient proof that such lawful efforts would have been pursued and pursued successfully. In post-Nix terms, without prior efforts the prosecution did not meet its burden of showing that the discovery of the evidence was inevitable.

On the other hand, the Ninth Circuit, on a fact pattern quite similar to the one at hand here, applied the inevitable discovery exception with no concern for the presence of an ongoing legal investigation. United States v. Merriweather, 777 F.2d 503 (9th Cir. 1985). In that case, an arrest was made outside a hotel room and FBI agents checked the rooms to see if anyone else was present. During this check, one of the agents searched

the toilet tank and found a large sum of money. A search warrant for the hotel room was subsequently obtained based upon information unrelated to the toilet tank search. The court found that the warrant was authorized upon independent information and that the discovery was inevitable because the legal search was carried out by agents ignorant of both the existence and location of the money. Quoting the Supreme Court in Nix, the court reasoned that there would be no deterrence value in suppressing the prewarrant evidence.

It is also worth noting that despite the Fifth Circuit's requirement that prior legal efforts be in esse at the time of the illegal discovery, first adopted by the Fifth Circuit in United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), that court has allowed the admission of evidence first found during an illegal entry when a legal warrant for the premises was subsequently obtained on the

grounds that it would have inevitably been discovered under the warrant. United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981).

In addition to these cases, we must also consider the Second Circuit opinion in United States v. Segura, 663 F.2d 411, although its analysis did not include the inevitable discovery factor. The Second Circuit held, in a part of its opinion not affected by the Supreme Court's review, that evidence seen during an illegal prewarrant entry should be suppressed despite the later acquisition of a warrant. Suppression was necessary, the court reasoned, because it provided the only effective disincentive to illegal prewarrant entries and searches and, without this disincentive, police officers would find it easy to bypass "'the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded.'" Segura, 663 F.2d at

417 (quoting United States v. Roselli, 506 F.2d 627, 630 (7th Cir. 1974).

Our review of these cases reveals that there are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection? All three of these concerns are voiced as reasons for adopting a requirement that some kind of active pursuit of legal means be ongoing at the time of the police misconduct.

Confining our analysis to the warrantless search cases, the first distinction to be made is between warrantless searches that are never followed by a warrant and warrantless searches that are followed by a warranted search. In the former situation, the concern for inevit-

ability and the concern for weakening the fourth amendment are two sides of the same coin. In terms of inevitability, it could be argued that allowing the admission of evidence found during a warrantless search merely because the prosecution can show by a preponderance of the evidence that sufficient probable cause existed to justify the issuance of a warrant fails to prove that a warrant would inevitably have been sought or approved by a magistrate. Phrased as a fourth amendment argument, the application of the inevitable discovery rule where no warrant is in fact obtained would substitute proof by a preponderance of the evidence that a warrant could and would have been obtained for the requirement of the fourth amendment that a warrant must in fact be obtained through a neutral and detached magistrate prior to a search. Such an approach substantially weakens the protection provided by the fourth amendment. When the active pursuit requirement is used, as it was

in Cherry and Owens, to preclude application of the inevitable discovery rule in "no warrant" situations, it is these concerns which are primary.

The stakes are somewhat different in cases where a warrant has been obtained subsequent to the illegal search. The fact that a warrant has been obtained removes speculation as to whether a magistrate would in fact have issued a warrant on the facts and also ensures us that the fourth amendment has not been totally circumvented. However, other concerns rise to the fore. As the court in Satterfield suggested, where a warrant is only sought after an illegal search reveals evidence of criminal activity, we begin to worry whether the later warrant is truly inevitable and independent of the police misconduct. Certainly, there is a spectre of random or not so random searches by the police followed by the initiation of an investigation leading to the development of probable cause for all premises showing signs

of criminal activity. The Fifth Circuit's requirement that the police possess the leads making discovery inevitable at the time of the misconduct serves to deter such practices, a deterrence which is necessary to protect the fourth amendment requirement that a warrant be obtained before a search takes place.

We now turn to the requirement that "the police . . . prior to the misconduct . . . [be] actively pursuing the alternate line of investigation." Cherry, 759, 759 F.2d at 1204. What purpose does this requirement serve? It is clear that in a case like Nix, which did not involve a warrant, the active pursuit by the police of a legal avenue of investigation at the time of the misconduct was necessary to convince the Court that the discovery would in fact have been inevitable and it provided historical facts beyond mere speculation to back up this conclusion. The situation where a warrant is obtained after a warrantless search is somewhat different. The inevitability

concerns, i.e., whether a warrant would have issued and whether the search would have uncovered the evidence, are pretty much resolved. In this kind of situation, the requirement of active pursuit could be viewed as ensuring the independent inevitability of the police decision to seek the search warrant, i.e., to ensure that the evidence turned up in the illegal search did not influence this decision. As a protection of the independence of the warrant, however, this bright-line rule goes too far. Most of the time, if the police are already in possession of probable cause for the warrant, a gap between the illegal discovery and the initiation of the warrant will be due to various practical problems entirely unrelated to a decision to seek a warrant. For example, in the case at hand, the delay between the search of the garage and the time that Sergeant Carpenito and Lieutenant Brown initiated the warrant process was clearly attributable to the time it took the two officers to complete their duties in Massachusetts

and drive back to New Hampshire. There can be little doubt that at the time the securing of the property was ordered, a decision to seek a search warrant had been made which was in no way influenced or accelerated by Sergeant DuBois' discovery of the drugs.

If the active pursuit requirement is not necessary across the board to ensure that the decision to seek a search warrant on pre-existing probable cause is truly independent, that leaves only the deterrence rationale put forward in Cherry and Segura to justify such a requirement. The Cherry court argued that the suppression of evidence illegally discovered at a time when the police were not yet in active pursuit of an alternative avenue of investigation is necessary to remove what would otherwise be an incentive to police to take a chance that the inevitable discovery exception might save the evidence in a situation where the discovery of the evidence seemed doubtful. We do not find, however, that the

use of this requirement achieves this purpose. If the demands that the legal means of obtaining the evidence be both inevitable and independent are strictly enforced, post hoc suggestions of alternate legal means will not be accepted as a basis for application of the inevitable discovery exception.

Rather than setting up an inflexible "ongoing" test such as the Fifth Circuit's, we suggest that the analysis focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented. A Nix-like case may well require that active pursuit of the investigation be underway to satisfy the test of inevitability and independence. This requirement may also be appropriate in illegal search cases where no warrant is ever obtained. In cases where a warrant is obtained, however, the active pursuit requirement is too rigid. On the other hand, a requirement that probable cause be present

prior to the illegal search ensures both independence and inevitability for the prewarrant search situation.

We conclude, therefore, that in this case there is no necessary requirement that the warrant application process have already been initiated at the time the illegal search took place. Given the facts available to Sergeant Carpenito, who ordered the prewarrant securing of the defendant's premises and later drafted the affidavits for the warrants, we are confident that a search warrant for the garage would have inevitably been sought and issued even if the illegal search had never taken place. The district court properly admitted the drugs found in the garage as evidence.

THE WARRANT AFFIDAVIT

After holding the Franks v. Delaware hearing, the district court found that, although the affidavit was confusing and misleading, this was "the result of carelessness and confusion, not the result of intentional deception

or reckless disregard of the truth." This finding was based, of course, not only on the testimony adduced at the hearing but on the district court's assessment of the credibility of the affiant.

Although the Franks v. Delaware requirement of perjury or reckless disregard of the truth, 438 U.S. at 156, was not established, the district court rewrote the affidavit in two forms. One form eliminated the conflation by correctly identifying the father and son, the other expunged all references to the son by referring to him as Frederick LNU (last name unknown). It then held that "neither of the two concurrent requirements of Franks v. Delaware . . . have been satisfied" and ruled that the search warrant was valid.

The district court's determination of the affiant's credibility was within its discretion and we find no abuse of discretion. Based on our review of the record and the

applicable law, we find that the district court made no clearly erroneous findings of fact and no errors of law in conducting and deciding the Franks hearing.

Affirmed.

No. 86-678

In the Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK R. SILVESTRI, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence that was discovered as a result of an illegal entry, but would inevitably have been discovered through a valid search under a warrant that the government had already decided to obtain, may be admitted at trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-43) is reported at 787 F.2d 736.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1986. The petition for a writ of certiorari was filed on June 2, 1986, and is therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial on stipulated facts in the United States District Court for the District of Massachusetts, petitioner was convicted of possessing more than 1000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in

violation of 21 U.S.C. 846. He was sentenced to imprisonment for a year and a day. The court of appeals remanded the case to the district court to make findings on certain factual issues relating to petitioner's motion to suppress marijuana found in his garage. *United States* v. *Curry*, 751 F.2d 442 (1st Cir. 1984). On remand, the district court denied the suppression motion. The court of appeals affirmed (Pet. App. 1-43).

1. The pertinent evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 4-6). It showed that sometime between 3:00 and 3:30 a.m. on April 30, 1982, police officers entered and secured property owned by petitioner in New Durham, New Hampshire, pending the arrival of a search warrant. The officers had been told by other police officers that there was reason to believe that large quantities of marijuana were present on the property and that they should secure the premises (*id.* at 4).

There were two buildings on the property: a single-family dwelling, occupied by petitioner, and an apartment over a garage, occupied by the estranged wife of petitioner's son. All occupants of the residences were awakened, and the police fanned out through the dwellings to ensure that no other persons were inside. Sometime before the arrival of the search warrant, Sergeant DuBois asked petitioner, who was being detained, if the garage was open. On learning that the garage was locked, Sergeant DuBois asked for the key, and petitioner provided it. Sergeant DuBois unlocked the garage and looked inside; in the garage, he saw a number of bales of marijuana and blocks of hashish. Pet. App. 4-5.

Sergeant DuBois then called the state police barracks in Epping, New Hampshire, and reported that he had found marijuana in the garage. A search warrant was ultimately obtained by the same officer who had ordered the premises secured, and it arrived in New Durham at 11:30 that morning. At that time, the police seized 99 bales of marijuana

from the garage, a truck registered to petitioner containing 1489 pounds of hashish, and a block of hashish in petitioner's house. Pet. App. 5-6.

2. Before trial, petitioner moved to suppress the evidence found in his garage. He argued, among other things, that the warrantless entry into the garage was unlawful and that the search warrant was unsupported by probable cause. The district court ruled that the affidavit supporting the warrant provided probable cause to search the property. Although it agreed with petitioner that the warrantless entry was unlawful, it concluded that no information obtained as a result of the entry was necessary to the finding of probable cause (751 F.2d at 447, 449). Accordingly, the court denied the suppression motion.

The court of appeals remanded the case for further factual findings. The court noted that the Second Circuit had held that evidence discovered in plain view during an unlawful prewarrant entry must be suppressed. *United States* v. *Segura*, 663 F.2d 411, 417 (2d Cir. 1981), opinion after remand, 697 F.2d 300 (1982), aff'd on other grounds, 468 U.S. 796 (1984). In light of *Segura*, the court directed the district court to determine what evidence introduced at trial, if any, was observed in plain view during the initial illegal entry (751 F.2d at 449).

3. On remand, the district court found that the only evidence discovered by the police during the initial unlawful entry was the marijuana and hashish in the garage. The court went on to find, however, that that evidence was admissible at trial under the inevitable discovery doctrine. In so holding, the court concluded that the evidence would inevitably have been discovered during the later warrant-authorized search and that preparation of the warrant application had begun by the time the evidence was found. Pet. App. 7-8.

Petitioner appealed again. First, the court of appeals agreed with petitioner that the district court had erred in finding that the process of preparing the search warrant application had begun at the time of the discovery of the evidence in the garage (Pet. App. 19-24). The court declined, however, to adopt a rule under which the legal process for discovering the evidence must already have been set in motion at the time of the illegal action in order for the inevitable discovery doctrine to apply (*id.* at 37-41). The court acknowledged that active pursuit by the police of a legal avenue of investigation at the time of the unlawful act would be necessary in some cases to establish that the discovery of the evidence was inevitable, but it concluded that that was not the case here (*ibid.*). The court explained that, by the time petitioner's property was secured, the decision to obtain a search warrant had already been made (*id.* at 39). The court also explained that that decision was in no way "influenced or accelerated" by the discovery of the drugs in the garage (*ibid.*). The court observed that the delay between the search of the garage and the initiation of the warrant process was attributable to the time it took the officers charged with obtaining the warrant to complete their duties relating to this case in Massachusetts and to drive back to New Hampshire (*id.* at 38).[1]

The court rejected the argument that the suppression of evidence in cases like this one is necessary to remove what would otherwise be an incentive to police to take a chance that the inevitable discovery rule might save the evidence in

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[1]The officers were engaged in surveillance of petitioner's property in New Durham when they began following a truck that left the property. They followed the truck to Massachusetts and later participated in an arrest. They then were interviewed by district attorneys in Massachusetts for the purpose of obtaining search warrants to be executed there. They began preparing the warrant application at issue here when they returned to New Hampshire. Pet. App. 21.

a situation where the discovery of the evidence seemed doubtful (Pet. App. 39-40). The court explained that, "[i]f the demands that the legal means of obtaining the evidence be both inevitable and independent are strictly enforced, post hoc suggestions of alternate legal means will not be accepted as a basis for application of the inevitable discovery exception" (*id.* at 40).

ARGUMENT

Petitioner contends that the court below erred in applying the inevitable discovery doctrine to uphold the admission of the drugs found in the garage. He claims that that decision conflicts with decisions of other courts of appeals. The decision of the court of appeals, however, was correct and does not conflict with the decision of any other court of appeals.

Under the inevitable discovery doctrine, unlawfully obtained evidence should not be suppressed so long as it can be shown by "demonstrated historical facts" that the evidence would inevitably have been discovered by independent lawful means. *Nix* v. *Williams*, 467 U.S. 431, 445 n.5 (1984). Here, it is certain that lawful means would have led to discovery of the drugs. As the court of appeals correctly found (Pet. App. 39), "at the time the securing of the property was ordered, a decision to seek a search warrant had been made which was in no way influenced or accelerated by Sergeant DuBois' discovery of the drugs." Indeed, the very purpose of securing the property was to maintain the status quo pending acquisition of the search warrant. In short, there can be no doubt in this case that "a search warrant for the garage would have inevitably been sought and issued even if the illegal search had never taken place" (*id.* at 41).[2] Accordingly, the inevitable discovery doctrine was properly invoked.

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[2]Petitioner does not dispute that the police had probable cause to obtain a search warrant at the time the property was secured, and the court of appeals in *Curry* expressly so held (751 F.2d at 448-449).

The cases on which petitioner relies do not aid his cause. Petitioner cites *United States* v. *Segura, supra*, for the proposition that evidence discovered during an unlawful prewarrant search should be suppressed despite the later acquisition of a warrant (Pet. 11).[3] *Segura* was premised on the notion that its rule was necessary to remove the incentive to disregard the Fourth Amendment (663 F.2d at 417). That premise, however, was subsequently undercut in *Nix* v. *Williams* by the Court's rejection of the argument that, in the absence of an inquiry into the good faith of the officers, the inevitable discovery doctrine would encourage constitutional violations. The Court explained (467 U.S. at 445-446) that,

> when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. * * * In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.

The court of appeals in *Segura* did not mention the inevitable discovery doctrine. Moreover, the court seemed particularly influenced by the fact, not present here, that the agents in that case "went out of their way to create the circumstances that they contend constituted the emergency

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[3]We did not concede the correctness of that holding in *Segura* but did not contest it in this Court (*Segura* v. *United States*, 468 U.S. 796, 802-803 n.4 (1984)).

justifying entry" (663 F.2d at 417). In sum, it is far from clear that the Second Circuit would adhere to *Segura* and its deterrence-based rationale after *Nix* v. *Williams*, or that it would extend *Segura* to the different facts of this case.[4]

Petitioner next (Pet. 13) relies on *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985), and *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985), but those cases do not help him.[5] In each of those cases, the court took the view that a later warrant-authorized search may justify admission of evidence that was seized unlawfully only if, at the time of the illegal action, the government already had begun the process of obtaining a warrant. 759 F.2d at 1206; 743 F.2d at 846.

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[4]Petitioner also relies (Pet. 11-12) on the Second Circuit's earlier decision in *United States* v. *Alvarez-Porras*, 643 F.2d 54, cert. denied, 454 U.S. 839 (1981). In that case, the court of appeals *upheld* the admission of evidence obtained during an illegal prewarrant search (643 F.2d at 65), and any suggestion that it would have done otherwise on different facts is simply dictum. In addition, the court's emphasis on the "agents' good faith in trying to comply with the warrant requirement" (*ibid.*), if read to superimpose a requirement of good faith on the inevitable discovery doctrine, cannot survive the directly contrary holding of *Nix* v. *Williams*, 467 U.S. at 445-446. Accordingly, *Alvarez-Porras* does not help petitioner.

[5]Petitioner also notes that the courts in both *Cherry* and *Satterfield* cited *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), and he appears to be relying on a conflict with that "leading case" (Pet. 13). The relevant holding of *Griffin*, however, can no longer be considered to be the law of the Sixth Circuit. That holding was that there is no inevitable discovery doctrine at all. 502 F.2d at 961 ("The assertion by police * * * that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."); see also *United States* v. *Apker*, 705 F.2d 293, 306 (8th Cir. 1983) ("Only the Sixth Circuit has explicitly rejected the inevitable discovery exception. *United States* v. *Griffin* * * *."), cert. denied, 466 U.S. 950 (1984). Since *Griffin*, both this Court and the Sixth Circuit have accepted the inevitable discovery doctrine. See *Nix* v. *Williams*, 467 U.S. at 440 n.2 (citing *Papp* v. *Jago*, 656 F.2d 221, 222 (6th Cir.), cert. denied, 454 U.S. 1035 (1981)).

Because that process had not begun in either *Cherry* or *Satterfield*, the courts declined to apply the inevitable discovery doctrine. In neither *Cherry* nor *Satterfield*, however, does the opinion indicate that a decision to seek a warrant had preceded the illegal discovery and seizure of the evidence, as was true in this case. In *Cherry*, a warrant was never sought; the attempts made to justify admission of the unlawfully seized evidence were on the ground that a warrant *could* have been obtained (759 F.2d at 1206). In *Satterfield*, the deputy sheriffs had determined at the time of the unlawful entry *not* to seek a warrant, "because a warrant probably could not have been acquired for several hours, during which time the occupants might have escaped" (743 F.2d at 843). Those cases do not help petitioner, because in this case the government had already decided to obtain a warrant when the illegal entry occurred, and the evidence in this case was not seized until after the warrant was obtained.[6]

The evident purpose of the rule adopted in *Cherry* and *Satterfield* was to discourage law enforcement agents from conducting unlawful searches with the knowledge or in the hope that they could obtain a valid warrant later. 759 F.2d at 1204-1205; 743 F.2d at 846. As the *Cherry* court explained (759 F.2d at 1204), however, officers have no incentive to take such a shortcut when they are already pursuing an alternate line of investigation that will inevitably lead them to the evidence they seek. Thus, the rule of *Cherry* and *Satterfield* is grounded on the need to establish actual "inevitability" at the time of the illegal action. See

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[6]In another Fifth Circuit case preceding *Cherry*, the court allowed the admission of evidence found during an illegal entry when a legal warrant for the premises later was obtained, even though the process of obtaining the warrant had not yet begun at the time of the initial entry. *United States* v. *Fitzharris*, 633 F.2d 416 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981); accord *United States* v. *Merriweather*, 777 F.2d 503 (9th Cir. 1985), cert. denied, No. 85-6384 (Mar. 31, 1986).

759 F.2d at 1207 (emphasis added) ("we conclude that the government *has not shown* that the pistol, bullets, and pistol case would inevitably have been discovered by entirely lawful means"); see also *id.* at 1205 n.10. That need clearly was satisfied here, where a "demonstrated historical fact"—the order to secure the property pending the acquisition of a warrant—showed that the decision to seek a warrant was made before the entry into the garage.[7]

Finally, petitioner relies (Pet. 14) on *United States* v. *Owens*, 782 F.2d 146 (10th Cir. 1986).[8] There is no conflict between *Owens* and the decision below. The government's assertion in *Owens* was not that a lawful warrant would have been obtained, but that a motel maid would have found the evidence and reported it to the police (782 F.2d at 152-153). The court simply rejected, as a factual matter, the government's "highly speculative assumption of 'inevitability' " (*id.* at 153). By contrast, in the present case the government's assertion that discovery was inevitable was not at all speculative and was properly accepted by the courts below.

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[7]The discovery of the evidence by lawful means was more inevitable at the time of the illegality here than in *Nix* v. *Williams*. Although the search for the body in that case was already in progress when the officers unlawfully obtained Williams' statement, it was by no means certain that the body would be found (see 467 U.S. at 448-450). Here, by contrast, although the officers had not yet begun preparing the warrant application at the time of the unlawful entry, it had already been decided that they would seek a warrant. Moreover, as the court of appeals readily determined, the warrant would have been issued, and the subsequent search of the garage would have turned up the evidence (Pet. App. 41).

[8]Petitioner also cites the Tenth Circuit's earlier decision in *United States* v. *Romero*, 692 F.2d 699 (1982), but in that case the court upheld the admission of unlawfully seized evidence under the inevitable discovery doctrine. There is nothing in the opinion in *Romero* that is inconsistent with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

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No. 86-678

IN THE

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UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE FOR MICHAEL F. MURRAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-678

FREDERICK R. SILVESTRI, SR.,

Petitioner

v.

UNITED STATES OF AMERICA

Petitioner and the United States have consented to the filing of this *amicus* brief, which has been filed before December 20, 1986, the time allowed for the government's brief in opposition.

INTEREST OF THE AMICUS CURIAE

Michael F. Murray is filing, simultaneously with this *amicus* brief, a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit (*Murray v. United States,* No.86-_____) presenting the following question:

> When officers discover evidence during an illegal search, later obtain a valid warrant, "search" the premises again and remove what they previously found, must such evidence be suppressed, as seven other Circuits and the highest courts of at least nine states have decided, or does the inevitable discovery doctrine create an exception to the exclu-

sionary rule in such circumstances, as the First Circuit held in this case?

Murray was a co-defendant in *United States v. Moscatiello*, 771 F.2d 589 (1st Cir. 1985), and had filed a certiorari petition in the October 1985 Term raising this Fourth Amendment issue. See Petition for a Writ of Certiorari in *Murray v. United States*, No.85-1118. His petition also presented a question under the Speedy Trial Act. On May 27, 1986, this Court granted the petition, vacated the judgment and remanded the case "for further consideration in light of *Henderson v. United States*, 476 U.S. ___(1986)." On remand, the court of appeals adhered to its original decision that the Speedy Trial Act had not been violated (*United States v. Carter & Murray*, Nos.84-1262, 84-1263, decided October 7, 1986) and on October 31, 1986, denied a timely petition for rehearing. Justice Brennan, on December 9, 1986, ordered that the mandate be stayed pending the timely filing of a petition for a writ of certiorari.

The decision of the court of appeals in *United States v. Moscatiello, supra*, preceded and controlled the decision in this case (*United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986)). Therefore, the Court's disposition of Silvestri's certiorari petition may affect Murray's pending petition and his rights under the Fourth Amendment.

DISCUSSION

As the petition for a writ of certiorari filed by Michael F. Murray discusses in some detail, there is a conflict among the courts of appeals with respect to the important and recurring Fourth Amendment question presented in Murray's and Silvestri's

certiorari petitions. For the reasons that follow, the Court may wish to defer acting on Silvestri's petition so that it may be considered in conjunction with Murray's petition and the government's response thereto.

1. Silvestri's petition is out of time under Rules 20.1 and 29.1 of the Rules of this Court, as the government notes in its opposition.[1] Murray's pending petition does not present a timeliness problem.

2. The petition filed by Murray with this *amicus* brief is comprehensive and therefore may assist the Court in determining whether to grant review of the Fourth Amendment question presented in both cases.[2] For example, Murray's petition cites and discusses decisions from the highest courts of nine states that conflict with the First Circuit's judgment in *Silvestri* and in Murray's case. Murray's petition also explains why the "search-unlawfully-first-obtain-the-warrant-later" procedure endorsed by the First Circuit and supported by the government poses such a severe threat to Fourth Amendment values and why so many other courts of appeals have rejected it.

3. The government in *Silvestri* claims that the decisions in *United States v. Segura*, 663 F.2d 411, 417 (2d Cir. 1981), opinion on remand, 697 F.2d 300 (1982), *aff'd on other grounds*, 468 U.S. 796 (1984),

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[1] Silvestri first sought to file his petition on June 2, 1986, which was more than 60 days after entry of the judgment in his case. His petition was apparently returned because of a technical defect and was filed in its present form on October 30, 1986.

[2] Silvestri is appearing *pro se* and portions of his petition appear to have been copied from Murray's original petition and reply brief in No. 85-1118.

and *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974), may not be in conflict with the First Circuit's decision. Brief in Opp., at pp. 6-7 & n.5. The government is mistaken. As Murray's pending petition explains, the First Circuit itself acknowledged in his case that *Segura* is "on all fours" and that *Griffin* decided the issue the other way. *United States v. Moscatiello*, 771 F.2d at 603-04. To suppose, as the government does, that *Segura* and *Griffin* might today be decided differently in light of *Nix v. Williams*, 467 U.S. 431 (1984), is to beg the question presented. The Second Circuit had already recognized the inevitable discovery doctrine by the time it decided *Segura*. See *United States v. Falley*, 489 F.2d 33, 40 (2d Cir. 1973). Moreover, *Griffin's* refusal to emasculate the warrant requirement because the government "inevitably" would have complied with the Fourth Amendment, is scarcely surprising. Other courts of appeals, even after *Nix*, have reached the same result.

With respect to two of these other Circuits (see *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985)), the government asserts there is no conflict because, unlike *Silvestri*, there is no indication in *Satterfield* or *Cherry* that the police had decided to seek a warrant before they searched without one. Brief in Opp., at pp. 7-9. We have several responses.

First, the government's factual distinction in *Silvestri*—that the police "had already decided to obtain a warrant when the illegal entry occurred, and that the evidence in this case was not seized until after the warrant was obtained" (Brief in Opp., at p. 8)—

does not apply to Murray's case. There the court of appeals applied the inevitable discovery doctrine despite the facts that the officers had not decided to seek a warrant before they broke into the warehouse without one, that they had not taken any steps to procure a warrant before their illegal search, and that they had seized the evidence from the moment of their illegal discovery of it.[3]

Next, the First Circuit in *Silvestri* expressly considered and rejected *Satterfield* and *Cherry*, recognizing that if it followed those decisions the illegally discovered evidence in *Silvestri* would be suppressed. *United States v. Silvestri*, 787 F.2d at 743-46. *Sat-*

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[3] In asserting that the evidence in *Silvestri* "was not seized until after the warrant was obtained," the government contradicts the First Circuit's holding that the evidence was "illegally seized and the warrant did not effectuate a legal seizure." 787 F.2d at 741. Perhaps the government uses the term "seized" to mean that the evidence was not "taken away" until after the warrant issued. If so, the distinction is meaningless under the Fourth Amendment.

The government also thinks it important that the hiatus between the illegal search in *Silvestri* and issuance of the warrant may be explained on the basis that there were only a few police officers involved, that the events took place in the early morning hours, and that the policemen who were planning to get a warrant were busy following a truck to Massachusetts and driving back. Brief in Opp., at pp. 3-4 & n.1, 5; see also *United States v. Silvestri*, 787 F.2d at 745. No such explanation is possible in Murray's case. There the illegal search took place on a Wednesday afternoon; fifteen agents of the DEA and FBI were involved; and an Assistant United States Attorney was on the scene. That a warrant was not obtained until seven hours later cannot be attributed to driving distance. After the illegal search, agents proceeded directly to the United States Attorney's Office in Boston.

terfield and *Cherry* require that the police pursue the lawful means of discovery—a search warrant—before their illegality; yet the *Silvestri* court found "that the warrant process had not been initiated at the time of the discovery of the evidence." 787 F.2d at 742.

Furthermore, *Satterfield, Cherry, Silvestri* and Murray's case, as well as other cases involving this issue, have one critical fact in common—that the officers have determined not to obtain a warrant before conducting a search.[4] To hold, as the government urges, that the exclusionary rule does not apply whenever the officers later procure a search warrant for the same premises and take away what they have illegally discovered is to render the warrant process an empty formality and to contravene the Fourth Amendment's requirement that a warrant must be obtained *before* the search. The magistrate's role in such cases would be perverted. His warrant would function, not as a prior authorization to conduct a search, but as evidence that the police could have searched legally, as an exhibit to be held up as proof of inevitability. In the end, the government's message is that the police, in order to ensure the admissibility of illegally discovered evidence, should first announce among themselves or formulate in their minds a decision to seek a warrant and only then break down the door and conduct their illegal search. If they find anything worth removing, they can then seek a war-

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[4] The fact—or more accurately, the assumption (787 F.2d at 745)—that the police in *Silvestri* "decided to obtain a warrant" before they searched without one makes the case for suppression all the more compelling. It shows the police knew they needed a search warrant in order to enter the premises, yet entered anyway.

rant, being careful to conceal from the magistrate information about what they illegally found in order to ensure the warrant is untainted. See *Segura v. United States*, 468 U.S. 796, 814 (1984).

4. The government also claims there is no conflict between *United States v. Owens*, 782 F.2d 146 (10th Cir. 1986), and the decision in *Silvestri* because the "government's assertion in *Owens* was not that a lawful warrant would have been obtained, but that a motel maid would have found the evidence and reported it to the police," a proposition rejected as a factual matter. Brief in Opp., at p. 9. That is only part of the story. The court's holding in *Owens*, not the "government's assertion," is what matters. On that score, the court of appeals in *Owens* held that at the time of the illegal search there must be an independent police investigation underway, one that was being separately pursued, in order for the inevitable discovery doctrine to apply. 782 F.2d at 152. After recognizing that *Owens* so held, the court in *Silvestri* refused to follow that decision. 787 F.2d at 743, 745-46. The ruling in *Owens* is directly contrary to the First Circuit's decision in *Silvestri* and its decision in Murray's case, which involved "one continuous series of events," not "two separate searches for evidence . . .." Brief for the United States in Opp., Nos. 85-1105, 85-1118 and 85-1120, Oct. Term 1985.

5. The government believes that the First Circuit does not stand alone on this question, that the Ninth Circuit also applies the inevitable discovery doctrine in this Fourth Amendment context. See Brief in Opp., at p. 8 n.6, citing *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1497 (1986). However, as Murray's certiorari petition dis-

cusses, the Ninth Circuit's position is far from certain. In a case decided after *Merriweather*, Judge Reinhardt lamented "the passing of still another important part of the protection that the Fourth Amendment was intended to afford." *United States v. Andrade*, 784 F.2d 1431, 1434 (9th Cir. 1986) ("specially concurring"). Recently, however, another panel of the Ninth Circuit, without citing *Merriweather*, rejected the government's inevitable discovery argument, stating that "to excuse the failure to obtain a warrant merely because the officer had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the Fourth Amendment." *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) (dictum).

CONCLUSION

For the foregoing reasons, the Court may wish to defer action on the petition in this case so that it may be considered in conjunction with the certiorari petition of Michael F. Murray and the government's response thereto.

Respectfully submitted,

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